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The Return of the Lorax: *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), Can States "Speak" for the Trees?

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Note*

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I. INTRODUCTION

At the far end of town
where the Grickle-grass grows
and the wind smells slow-and-sour when it blows

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and no birds ever sing excepting old crows . . .
is the Street of the Lifted Lorax.

And deep in the Grickle-grass, some people say,
if you look deep enough you can still see, today,
where the Lorax once stood
just as long as it could
before somebody lifted the Lorax away.

What *was* the Lorax?
And why was it there?
And why was it lifted and taken somewhere
from the far end of town where the Grickle-grass grows?
The old Once-ler still lives here.
Ask him. *He* knows.[1]

In Dr. Seuss' world, the Lorax was a creature that spoke for the trees. The Lorax issued warnings and even resorted to pleas. But the old Once-ler refused to heed any advice and continued to cut down the Truffala Trees. Soon there was nothing left but pollution and smog, and the Lorax and all of his friends had no choice but to leave.

Global warming is a divisive issue. Traditionally, it has been environmentalists on one side of the debate and industrialists on the other. However, as scientific evidence continues to mount, societies are becoming increasingly conscious of the effects that human activities have on the environment. Concerns are mounting and the stakes are increasing for those on both sides of the issue. The center of the global warming debate involves two questions: (1) Is the Earth warming because of natural phenomenon or because of human-related activities? (2) What action, if any, should society take to minimize the impact of global warming? In *Massachusetts v. EPA*,[2] the battle entered the courtroom after twelve states, four local governments, and twelve private organizations ("Petitioners") unsuccessfully petitioned the Environmental Protection Agency ("EPA"), seeking greenhouse gas regulation.[3]

The Petitioners requested that the agency regulate four greenhouse gases under section 202(a)(1) of the Clean Air Act ("CAA").[4] Section 202(a)(1) requires the Administrator to regulate the emission of any air pollutant from any new motor vehicle, which the Administrator determines may contribute to air pollution and endanger public health or welfare.[5] The EPA, supported by ten intervening states and six trade associations, argued that the issue was not justiciable because the Petitioners did not have standing to invoke the jurisdiction of the Court under Article III of the Constitution.[6]

1. DR. SEUSS, THE LORAX 1–3 (1971).
2. Massachusetts v. EPA, 127 S. Ct. 1438 (2007) [hereinafter *Massachusetts II*].
3. *Id.* at 1446.
4. *Id.*
5. 42 U.S.C. § 7521(a)(1) (2006).
6. *Massachusetts II*, 127 S. Ct. 1438, 1446–47.

In *Massachusetts v. EPA*, the Supreme Court issued two holdings—the first covered the procedural aspects of the case, and the second addressed the merits. The Court issued a 5-4 decision holding that at least one Petitioner—Massachusetts—had standing to exercise the jurisdiction of the court.[7] The majority reasoned that Massachusetts had "special solicitude" in the Court's standing analysis and that Massachusetts demonstrated the requisite injury-in-fact, traceability, and redressability to establish standing.[8] The Court also ruled 5-4 that the EPA does have the statutory authority to regulate carbon dioxide emissions from new motor vehicles.[9] The majority held that if the EPA elects not to regulate carbon dioxide under the CAA, the reason for refusing must be consistent with the CAA.[10]

The purpose of this Note is twofold: first, to analyze the reasoning used by the majority in determining that Massachusetts had standing and explore the effect that the majority's reasoning will have on future cases; second, to investigate the potential consequences of the Court's decision that carbon dioxide is an air pollutant under the language of the CAA.

In order to analyze the Court's holding in *Massachusetts v. EPA*, it is necessary to first look at the underlying issue of global warming and the legal background of the CAA. In analyzing the procedural aspects of the case, it is necessary to look at the development of the standing doctrine and particularly its use in environmental cases. Part II of this Note explores the science surrounding climate change. This Part also gives a concise history of the CAA provisions relating to motor vehicle emissions and reviews the prerequisites necessary to establish standing for jurisdictional purposes. Part III discusses the original rulemaking request by the Petitioners to regulate greenhouse gases, and the EPA's denial of this request. Part III also examines the advancement of *Massachusetts v. EPA* through the Court of Appeals and the Supreme Court. Part IV will analyze the potential implications of the Supreme Court decision in *Massachusetts v. EPA* exploring (1) the possibility of administrative action and regulation of greenhouse gas emissions under the current CAA; (2) increased pressure on Congress to enact new legislation requiring mandatory reductions in greenhouse gas emissions; (3) increased state and local action to curb greenhouse gas emissions in the absence of federal action; and (4) the ramifications for industry, including the possible establishment of a carbon credit trading scheme.

7. *Id.* at 1452–58.
8. *Id.*
9. *Id.* at 1459–62.
10. *Id.* at 1462–64.

II. BACKGROUND

A. The Science of Global Warming

Global mean surface temperatures have risen by 0.74 degrees Celsius over the past 100 years.[11] The debate over this observed warming trend is whether it is the result of natural phenomena or whether human activities have been a contributing factor. The Earth has a naturally occurring greenhouse effect.[12] This greenhouse effect is the process by which certain gases in the atmosphere trap heat emitted from the planet's surface resulting in an added warming of the planet's atmosphere and surface.[13] In the absence of this warming effect, surface temperatures would be approximately 33 degrees Celsius cooler—meaning it would be too cold for most organisms to survive.[14]

The gases that lead to the warming effect, commonly known as greenhouse gases, include carbon dioxide, methane, nitrous oxide, ozone, and water vapor.[15] Scientists have observed an increase in the amount of these greenhouse gases present in the atmosphere.[16] Many scientists attributed the increase to human activities, but met resistance from those skeptical that human activities were impacting the natural process.[17] It is now widely accepted that humans have con-

11. Kevin Trenberth et al., *2007: Observations: Surface and Atmospheric Climate Change*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 237 (Susan Solomon et al. eds., Cambridge Univ. Press 2007) [hereinafter *IPCC Observations*]. This would be the equivalent of between one to two degrees Fahrenheit.

12. *See* Hervé Le Treut et al., *2007: Historical Overview of Climate Change*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 115–16 (Susan Solomon et al. eds., Cambridge Univ. Press 2007) [hereinafter *IPCC Historical Overview*] (explaining the greenhouse effect); Tom M.L. Wigley, *The Science of Climate Change: Global and U.S. Perspectives*, *in* PEW CENTER ON GLOBAL CLIMATE CHANGE 3–4 (explaining the existence of the "natural greenhouse effect"); EPA, Climate Change Science, http://www.epa.gov/climatechange/science/index.html (last visited Feb. 17, 2009) (providing a brief overview).

13. *See IPCC Historical Overview*, *supra* note 12, at 115–16.

14. EPA, *supra* note 12; Wigley, *supra* note 12, at 4. This would be the equivalent of 66 degrees Fahrenheit.

15. Wigley, *supra* note 12, at 4.

16. Richard B. Alley et al., *2007: Summary for Policymakers*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2 (Susan Solomon et al. eds., Cambridge Univ. Press 2007) [hereinafter *IPCC Policymaker Report*].

17. *See, e.g.*, Richard S. Lindzen, *Global Warming: The Origin and Nature of the Alleged Scientific Consensus*, REG.: CATO REV. BUS. & GOV'T, Spring 1992, at 87 (arguing that the issue of global warming is scientifically controversial).

tributed to the increased levels of greenhouse gases by burning fossil fuels.[18]

Scientists first began to explore the possibility that the climate is sensitive to the atmospheric level of gases over a century ago. In 1824, Joseph Fourier proposed the possibility of a greenhouse effect.[19] Building on this idea, Swedish scientist Svante Arrhenius predicted that a change in atmospheric levels of carbon dioxide coincided with glacial advances and retreats.[20] However, scientists did not begin measuring the current atmospheric levels of carbon dioxide until 1958.[21] While these measurements have allowed scientists to separate out human-related fossil fuel emissions from those that occur naturally, it is still necessary to compare this data with a longer-term record of carbon dioxide occurrences in the atmosphere.[22] Scientists have been able to obtain historic levels of greenhouse gas concentrations from ice core samples taken in Antarctica and Greenland.[23] Pre-industrial levels of atmospheric carbon dioxide measured approximately 270 to 280 parts per million by volume ("ppm").[24] The 2005 level was 379 ppm.[25] 2005 was one of the warmest years on record.[26] Eleven of the last twelve years rank among the warmest on record for surface temperatures.[27] The scientific evidence supports the conclusion that human activities have contributed to the rise in greenhouse gas levels and the corresponding effect of global climate change. The CAA is the best existing legislation that can be invoked to manage this issue.

18. *See* EPA, *supra* note 12; *IPCC Historical Overview*, *supra* note 12, at 103 (noting that natural factors alone cannot account for the climate changes observed and that a "substantial" influence of human activities is necessary to explain the changes).

19. *IPCC Historical Overview*, *supra* note 12, at 103 (Fourier hypothesized that "the temperature [of the Earth] can be augmented by the interposition of the atmosphere, because heat in the state of light finds less resistance in penetrating the air, than in repassing into the air when converted into non-luminous heat" after being influenced by greenhouse experiments of Horace Benedict de Saussure.).

20. *Id.* at 105.

21. *Id.* at 100 (noting that Charles David Keeling began measuring the current atmospheric levels of carbon dioxide in 1958 on Mauna Loa in Hawaii).

22. *Id.*

23. *Id.* (explaining that this data comes from air bubbles preserved in the ice cores and noting the record now goes back nearly one million years).

24. *IPCC Policymaker Report*, *supra* note 16, at 2; Wigley, *supra* note 12, at 5. PPM is the ratio of the number of greenhouse gas molecules to the total number of molecules of dry air.

25. *IPCC Policymaker Report*, *supra* note 16, at 2 (explaining this level exceeds the natural range over the last 650,000 years).

26. *IPCC Observations*, *supra* note 11, at 237. Since 1850, 1998 and 2005 were the two warmest years on record. *Id.*

27. *Id.* With the exception of 1996, 1995 through 2006 were the warmest years on record since 1850. *Id.*

B. The Clean Air Act: The Statutory Basis for the Petition

Congress has enacted a volume of legislation—including the CAA—that touches on the issue of greenhouse gases and global warming, but none of it clearly mandates the regulation of these gases. In 1963, Congress passed the CAA to protect the quality of the nation's air resources.[28] The original act left the primary responsibility of regulation to the states and authorized expanded research efforts, financial assistance for state and local governments, and assistance for the development of regional air control programs.[29] Section 6 of the CAA provided: "The Secretary shall encourage the continued efforts . . . to prevent pollutants from being discharged from the exhaust of automobile vehicles."[30]

Disappointed with the results, and amidst a growing concern for widespread air pollution, Congress substantially amended the CAA in 1970, increasing federal responsibility and authority.[31] The 1970 Amendments established technology-based emission standards for motor vehicles and gave the newly created EPA the authority to regulate hazardous air pollutants.[32]

In 1977, Congress amended section 202(a)(1)[33] of the CAA to its present form:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air

28. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. For background information on events leading up to the passage of the Clean Air Act, see ROY S. BELDEN, THE CLEAN AIR ACT 5–9 (2001) (discussing the Air Pollution Control Act of 1955, the 1963 Clean Air Act, and subsequent amendments); Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 63–64 (1975) (discussing the 1955 Congressional authorization of the Surgeon General to study air pollution and in 1960 directing the Surgeon General to examine the health hazards of motor vehicle emissions).

29. Clean Air Act of 1963 § 1.

30. *Id.* § 6. In section 9 of the Clean Air Act of 1963, Secretary is defined as the Secretary of Health, Education, and Welfare and "[a]ll language referring to adverse effects on welfare shall include but not be limited to injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to transportation." *Id.* § 9.

31. Pub. L. No. 91-604, 84 Stat. 1676 (1970). Congress previously amended the CAA in 1965 and 1966 to increase federal authority to control motor vehicle emissions. *See* Pub. L. No. 89-272, 79 Stat. 992 (1965) (establishing section 201 for the regulation of emissions from new motor vehicles); Pub. L. No. 89-675, 80 Stat. 954 (1966); *see also* Philip White, Jr., Annotation, *Clean Air Act*, 7 A.L.R. FED. 2D 357, § 2 (2005).

32. BELDEN, *supra* note 28, at 6–7.

33. It is under this provision that the Petitioners in *Massachusetts II* sought regulatory action by the EPA.

> pollution which may reasonably be anticipated to endanger public health or welfare.[34]

This amendment endorsed the D.C. Circuit's decision in *Ethyl Corp. v. EPA*, which held that the EPA was allowed to take regulatory action to prevent harm where risk was found to be significant.[35]

Section 202(a)(1) gives the EPA authority to regulate the emissions of air pollutants from new motor vehicles. The U.S. transportation system is the largest in the world and is instrumental in the stability and growth of the economy.[36] Americans travel 4.8 trillion person-miles every year, and in 2001 alone 3.7 trillion ton-miles of freight were moved.[37] All of this activity makes transportation a major emitter of greenhouse gases. Transportation accounts for over one-third of the carbon dioxide emitted in the United States.[38] Carbon dioxide emissions from transportation are increasing faster than any other sector.[39] With the exception of China, the United States transportation sector emits more carbon dioxide than any other nation's entire economy.[40] Despite the size of the transportation sector and volume of carbon dioxide that results from this activity, there has been much confusion as to whether the CAA actually applies to carbon dioxide emissions.[41]

In 1990, Congress again made significant amendments to the CAA, this time considering carbon dioxide directly.[42] A committee version of the bill included a provision to limit carbon dioxide emissions from

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34. 42 U.S.C. § 7521(a)(1) (2006). The current "reasonably be anticipated to endanger public health or welfare" language is less strict than the previous standard of "which endangers the public health or welfare." *See Massachusetts II*, 127 S. Ct. at 1447 n.7.
35. *See* Ethyl Corp. v. EPA, 541 F.2d 1, 25 (D.C. Cir. 1976) (which held that the Clean Air Act calls for action to prevent harm "even if the regulator is less than certain that harm is otherwise inevitable"); H.R. REP. NO. 95-294 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1127 (stating the committee's action is intended to support the majority opinion in *Ethyl*).
36. David L. Greene & Andreas Schafer, *Reducing Greenhouse Gas Emissions From U.S. Transportation*, *in* PEW CENTER ON GLOBAL CLIMATE CHANGE 1 (2003).
37. *Id.*
38. *Id.* at iii.
39. *Id.* at 3.
40. *Id.* at 2.
41. For example, former EPA General Counsel Gary Guzy stated "CO_2 is in the class of compounds that could be subject to several of the Clean Air Act's regulatory approaches." *Before a Joint Hearing of the Subcomm. on Economic Growth, Natural Resources and Regulatory Affairs of the H.R. Comm. on Government Reform and the Subcomm. on Energy and Environment of the H.R. Comm. On Science*, 106th Cong. (Oct. 6, 1999) (testimony of Gary S. Guzy, Gen. Counsel, U.S. Environmental Protection Agency), *available at* http://www.epa.gov/ocir/hearings/testimony/106_1999_2000/10699gg.htm.
42. Pub. L. No. 101-549, 104 Stat. 2399 (1990). The 1990 Amendments contained stricter standards for motor vehicle tailpipe emissions of hydrocarbons and nitrogen oxides. *Id.*

light duty vehicles.[43] The Senate Report stated that emissions from motor vehicles in the United States were a "significant portion" of carbon dioxide worldwide and that motor vehicles "produce one-quarter of the carbon dioxide emitted in the United States."[44] The intent of adopting the standards in the bill was not to significantly reduce the existing emission levels, but to prevent the current levels from increasing.[45] Congress abandoned the provision in conference committee and it was not enacted as part of the 1990 CAA Amendments.[46]

Those supporting the view that greenhouse gases—carbon dioxide, in particular—should not be regulated under the CAA argue that the legislative history of the 1990 Amendments establish that Congress did not recognize the CAA as authorizing the EPA to regulate greenhouse gases.[47] As additional support that Congress did not intend for the CAA to cover carbon dioxide, those opposed to regulation under the CAA also cite various Congressional discussions and legislative actions regarding the treatment of greenhouse gases. None of this legislation clearly called for the regulation of greenhouse gases.

In 1978, Congress passed the National Climate Program Act to improve the understanding of climate change, its causes, and the "social, economic, and political implications of [global] climate change" through research and information sharing.[48] In 1987, Congress passed the Global Climate Protection Act instructing the EPA to develop a coordinated national policy on global climate change and directed the Secretary of State to coordinate negotiations regarding climate change.[49] In 1990, Congress passed the Global Change Research Act, which established the Committee on Earth and Environ-

43. S. REP. No. 101-228, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3484–85 (setting emissions standards for light duty vehicles at no more than 266 grams per mile for model years 1996 to 1999 and no more than 220 grams beginning in model year 2000). Light duty vehicles are those with a gross weight of 8,500 pounds or less. *Id.*

44. *Id.*

45. *Id.* The Senate Report stated, "Reducing CO_2 from light duty vehicles will not solve the global warming problem. No single measure will. But the necessity for taking steps now is becoming more apparent as more scientific information becomes available." *Id.*

46. H.R. REP. No. 101-952, at 336–38 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 3867, 3868–70.

47. Bradford C. Mank, *Standing And Global Warming: Is Injury To All Injury To None?*, 35 ENVTL. L. 1, 67 n. 456 (2005). The 1990 CAA Amendments also created a stratospheric ozone program, which critics cite as further proof that Congress did not intend to regulate carbon dioxide as a pollutant. *Id.*

48. Pub. L. No. 95-367, 92 Stat. 601 (1978) (current version at 15 U.S.C. § 2901 (2006)).

49. Pub. L. No. 100-204, tit. XI, 101 Stat. 1407 (1987), *amended by* Pub. L. No. 103-199, 107 Stat. 2327 (1993) (current version at 15 U.S.C. § 2901 (2006)).

mental Sciences to coordinate a research program.[50] This legislation was enacted one day after the 1990 CAA Amendments were signed into law.

In 1992, the United Nations Framework Convention on Climate Change ("UNFCC") was convened in Rio de Janeiro. Countries agreed to reductions in order to stabilize greenhouse gas concentrations in the atmosphere. However, such reductions were voluntary as countries wished "to enable economic development to proceed in a sustainable manner."[51] Parties to the UNFCC later negotiated the Kyoto Protocol, which established mandatory reductions in the greenhouse gas emissions of developed nations.[52] The U.S. Senate refused to ratify the Kyoto Protocol because it did not place restrictions on developing nations such as India and China.[53] Instead, Congress unanimously adopted the Byrd-Hagel Resolution, which stated that the United States should not participate in any protocol that failed to require mandatory reductions for developing nations or that might otherwise harm the economy.[54]

Those supporting the position that carbon dioxide and other greenhouse gases were not intended to be regulated under the CAA argue that Congress had multiple opportunities to regulate carbon dioxide and other greenhouse gases in these numerous acts—including the 1990 CAA Amendments—and elected not for regulation, but instead chose further study.[55] Despite the history of the CAA and Congress's less than stellar record in establishing a definitive program for greenhouse gas legislation, Petitioners in *Massachusetts v. EPA* thought the language of the CAA was broad enough to encompass greenhouse gases in its regulatory scheme and initially sought action from the EPA. However, the EPA was not convinced that the Petitioners had standing to advance the claim through the federal court system.

C. Standing

Petitioners in *Massachusetts v. EPA* first submitted a rulemaking request to the EPA, asking the EPA to regulate greenhouse gases under section 202(a)(1) of the CAA.[56] The EPA denied the rulemaking request and Petitioners filed an appeal in the U.S. Court of Appeals

50. Pub. L. No. 101-606, 104 Stat. 3096 (1990) (current version at 15 U.S.C. § 2921 (2006)).
51. United Nations Framework Convention on Climate Change, art. 2, *opened for signature* June 4, 1992, S. TREATY DOC. No. 102-38 (1992), 1771 U.N.T.S. 107.
52. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* Mar. 16, 1998, 37 I.L.M. 22, 33.
53. Mank, *supra* note 47, at 19.
54. S. Res. 98, 105th Cong., 143 CONG. REC. S8138 (1997) (enacted).
55. *See supra* text accompanying notes 48–51.
56. *See infra* section III.A.

for the District of Columbia.[57] The EPA raised objections, arguing that Petitioners did not have "standing" to bring the case in federal court.[58]

Article III of the United States Constitution extends judicial power to "cases" and "controversies."[59] These two words have been the subject of much legal interpretation. The Constitution makes no open reference to the requirement of standing.[60] In fact, "standing" was not recognized as an Article III limitation until 1944.[61] However, the principle of standing had been relied upon in earlier cases.[62] Although, in these cases, standing required "a legal right to bring suit" recognized by the Constitution, by statute, or by common law.[63] If no right to sue existed under the common law or from an Act of Congress, then no Article III case or controversy existed.[64] Under the modern standing doctrine, a party could have a legal right to bring a suit, but still not meet the requirements necessary to establish standing.[65]

Commentators suggest that Justices Brandeis and Frankfurter were responsible for developing the modern doctrine of standing.[66] The creation of New Deal legislation in the mid-to-late 1930s and the formation of the administrative state added to the caseload of an already strained court system.[67] Critics argue that what started out as

57. *See infra* section III.B–C.
58. *See infra* section III.C.
59. U.S. CONST. art. III, § 2.
60. *See generally* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992). Article III indirectly limits the judicial power by only allowing the courts to hear cases and controversies, thus precluding the court from issuing advisory opinions. *Id.* at 168.
61. *See* Stark v. Wickard, 321 U.S. 288 (1944) (discussing "standing to sue" as having a legally protected right).
62. Sunstein, *supra* note 60, at 170–71 (noting that from until approximately 1920 there was no separate standing doctrine but that cases in the 1920s and 1930s relied on the notions of standing).
63. *Id.* at 170 (noting that even someone with a concrete interest could not sue unless a source of law had conferred the right to do so). Under this legal standard, Petitioners would have easily been able to meet the requirement as the Clean Air Act authorizes a procedural right. *See* 42 U.S.C. § 7607(b)(1) (2006).
64. Sunstein, *supra* note 60, at 170. Personal and economic interests were not sufficient. *See* ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS 359 (4th ed. 1997) (noting that a "mere personal or economic interest as not sufficient").
65. *See* Sunstein, *supra* note 60, at 170 (providing the example of citizen suits).
66. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1443–52 (1988); Sunstein, *supra* note 60, at 179–81; David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. LAND USE & ENVTL. L. 451, 458–59 (2000) (discussing Justices Brandeis and Frankfurter's attempts to protect New Deal legislation from judicial attack).
67. Winter, *supra* note 66, at 1452–53 (noting the large caseload of federal courts results from several factors including the creation of the federal question jurisdiction statute, removal jurisdiction, and the creation of administrative law).

a doctrine of justiciability has become a tool used by courts to screen cases. The doctrine of standing has evolved to effectively limit access to the courts by establishing prerequisites that must be met before a court will hear the merits of the case.[68]

Modern standing requires a party to have a "sufficient stake" in order to obtain a judicial resolution of a controversy.[69] To establish standing, a party must demonstrate they have suffered an "injury in fact," that the injury is "fairly traceable" to the actions of the opposing party, and is redressable by the relief requested from the court.[70] In other words, standing requires: (1) an injury; (2) traceability; and (3) redressability. The burden of proof is on the party seeking to invoke the jurisdiction of the court, and these elements must be established before the court can proceed to the merits.[71]

The "injury in fact" test was recognized in 1970.[72] Injury in fact is "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[73] A mere interest in the problem is not sufficient to establish an injury. Categories of injury can include aesthetic, conservational, recreational, and economic, but to establish an injury in fact, "the party himself must have suffered an injury."[74]

The traceability and redressability requirements were recognized in 1973.[75] Traceability requires the party bringing the action to demonstrate "a causal connection between the injury and the conduct complained of."[76] Traceability is essentially a causation requirement, but does not require a tort standard of causation.[77] Redressability is achieved by showing "that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[78]

68. *See* Maxwell L. Stearns, *From Lujan to Laidlaw: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321, 323 (2001) (arguing that "standing rules appear to have been motivated by political concerns").
69. Sierra Club v. Morton, 405 U.S. 727, 731 (1972).
70. Bennett v. Spear, 520 U.S. 154, 162 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).
71. *Lujan*, 504 U.S. at 561.
72. *Barlow v. Collins*, 397 U.S. 159 (1970) and *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) were both decided on March 3, 1970 and both referenced "injury in fact".
73. *Bennett*, 520 U.S. at 167; *Lujan*, 504 U.S. at 560–61.
74. *Sierra Club*, 405 U.S. at 738 (noting the Court recognized broad categories of injury in *Data Processing*, 397 U.S. at 154).
75. *See* Winter, *supra* note 66, at 1379 (citing Linda R.S. v. Richard D., 410 U.S. 614 (1973) and Warth v. Seldin, 422 U.S. 490 (1975)).
76. *Bennett*, 520 U.S. at 167; *Lujan*, 504 U.S. at 560–61.
77. *See* Tozzi v. U.S. Dep't of Health & Human Servs., 271 F.3d 301, 308 (D.C. Cir. 2001) (stating that "we have never applied a 'tort' standard of causation to the question of traceability"); Lujan v. Defenders of Wildlife, 504 U.S. at 560.
78. *Bennett*, 520 U.S. at 167; *Lujan*, 504 U.S. at 560.

Redressability requires that a favorable ruling will provide at least *some* relief to the injured party.[79]

Courts traditionally took a lenient approach to standing in environmental cases. In *Sierra Club v. Morton*, the plaintiff—an environmental group—sought an injunction to prevent federal officials from approving a skiing development in the Mineral King Valley.[80] The Court held that Sierra Club did not have standing because the group had not sufficiently alleged an injury demonstrating that it, or any of its members, would be affected by the actions of the defendant.[81] However, the Court did recognize that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[82] In *Sierra Club*, Justice Douglas' dissent went so far as to argue that inanimate objects should be given standing for the purposes of environmental litigation.[83]

In *United States v. Students Challenging Regulatory Agency Procedures* ("SCRAP"), a group of law students, along with other environmental groups, alleged that a new rate structure sought by railroads would cause its members "economic, recreational, and aesthetic harm."[84] The Court recognized the stated injuries as "less direct and perceptible[,]" but found that "the fact that Appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area" did not deprive them of standing.[85]

79. *Tozzi*, 271 F.3d at 310 (holding that to meet the redressability element only requires a petitioner to show it would receive at least some relief).

80. *Sierra Club*, 405 U.S. at 728–30.

81. *Id.* at 734–35. The Sierra Club only alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." *Id.*

82. *Id.* at 734. In *Sierra Club*, the Sierra Club alleged that it had a special interest in the conservation of national parks and sought to prevent development in the Sierra Nevada Mountains, which would result in development of a portion of the Sequoia National Forest. The Court held Sierra Club did not meet the injury in fact test because they did not allege that it, or any of its members, would be injured. *Id.*

83. *Id.* at 741 (Douglas, J., dissenting).

84. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 678 (1973).

85. *Id.* at 686–88. The court also stated that to deny standing where many others are injured would "mean that the most injurious and widespread Government actions could be questioned by nobody." *Id.* at 688.

However, with *Lujan v. National Wildlife Federation*[86] ("Lujan I") and *Lujan v. Defenders of Wildlife*[87] ("Lujan II"), the requirements for standing became increasingly difficult for plaintiffs in environmental suits. In *Lujan I*, the plaintiffs sought to challenge the criteria used by the Department of Interior to reclassify permitted uses on federal lands.[88] Several members of the group alleged that they hiked in the vicinity of the area and that their aesthetic and environmental interests would be harmed by the mining activities.[89] The Court ultimately found that the injury-in-fact requirement had not been adequately alleged despite the affidavits submitted by members of the citizens group claiming personal injury.[90]

In *Lujan II*, plaintiffs sued to challenge a Department of Interior ruling that the Endangered Species Act did not apply to federal action outside the United States. Justice Scalia wrote the majority opinion stating that once again an adequate injury had not been established.[91] Two of the members had alleged injury through an inability to observe certain endangered animals at some future point in time as a result of federal funds being directed toward the Aswan Damn project in Egypt.[92] However, the members had not given an exact date as to when they might return to observe these animals.[93] Emphasizing a more strict standard for injury-in-fact, the majority stated, "Where there is no actual harm . . . its imminence must be established."[94]

With the background and requirements for establishing standing in mind—a concrete and actual or imminent injury, traceability of this injury to the actions of the EPA, and redressability or the possibility of some relief that can be achieved by a favorable decision—the Petitioners in *Massachusetts v. EPA* first proceeded through the available administrative channels of the EPA with their request.

86. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) [hereinafter *Nat'l Wildlife Fed'n*].

87. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

88. *Nat'l Wildlife Fed'n*, 497 U.S. at 875–79.

89. *Id.* at 880.

90. *Id.* at 888–89. The Court said that alleging hiking in the vicinity was insufficient to show aesthetic or environmental harm caused by the Department of Interior. *Id.*

91. *Lujan*, 504 U.S. at 562–64.

92. *Id.* at 563–64.

93. *Id.* at 565.

94. *Id.* In his concurring opinion, Justice Kennedy suggested the standing requirement could have been met if the Plaintiffs had a specific date of return or had purchased plane tickets. *Id.* at 579–581 (Kennedy, J., concurring).

III. DEVELOPMENT OF THE CASE

A. Rulemaking Request

On October 20, 1999, twelve states, three cities, an American territory, and several environmental organizations requested that the EPA regulate carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons under section 202(a)(1) of the CAA.[95] Petitioners argued that these greenhouse gases met the definition of air pollutant as defined in section 302(g). Section 302(g) of the CAA defines an air pollutant as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters ambient air."[96]

Citing numerous scientific studies, Petitioners asserted that these gases, especially carbon dioxide emitted by motor vehicles, significantly contribute to global climate change.[97] Section 202 requires the Administrator to regulate those air pollutants that can reasonably be found to "endanger public health or welfare."[98] Section 302(h) of the CAA defines welfare expansively including, but not limited to, "effects on soils, waters, crops, vegetation, manmade materials, animals, wildlife, *weather*, visibility and *climate* . . . ."[99]

The petitioners also relied on a memorandum written in 1998 by former General Counsel of the EPA, Jonathan Cannon. Mr. Cannon expressed to then-EPA Administrator, Carol Browner, the legal opinion that the CAA granted the EPA "broad authority" to address pollutants.[100] This memorandum asserted that the CAA definition of "air pollutant" covered carbon dioxide, sulfur dioxide, nitrogen oxides, and mercury.[101] The memorandum also stated that Congress had already recognized carbon dioxide as a pollutant under section 103(g) of the

95. For a discussion of the Clean Air Act, see *supra* section II.B. Section 202(a)(1) gives the Administrator authority to regulate "air pollutants" emitted from new motor vehicles which the Administrator deems may endanger public health or welfare. 42 U.S.C. § 7521(a)(1) (2006).

96. 42 U.S.C. § 7602(g) (2006).

97. Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,923 (Sept. 8, 2003).

98. 42 U.S.C. § 7521(a)(1).

99. 42 U.S.C. § 7602(h) (emphasis added).

100. Memorandum from Jonathan Cannon, EPA Gen. Counsel, to Carol Browner, EPA Adm'r, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998), *available at* http://www.law.umaryland.edu/faculty/bpercival/casebook/documents/EPACO2memo1.pdf [hereinafter Cannon Memorandum]. The legal opinion of Jonathan Cannon was prepared as a result of a request by Congressman DeLay requesting clarification of a statement he read in an EPA document stating that EPA currently has authority under the CAA to establish pollution control requirements for carbon dioxide and several other pollutants created during electric power generation.

101. Cannon Memorandum, *supra* note 100.

CAA.[102] Mr. Cannon maintained that "[a] substance can be an air pollutant even though it is naturally present in air in some quantities."[103] The memorandum noted that several provisions of the CAA, including section 202(a)(1), link the EPA's authority to regulate with a precautionary standard that the Administrator need only make a determination that the air pollutant could have "potential harmful effects."[104] Gary Guzy, Mr. Cannon's successor, also affirmed that the EPA had authority under the CAA to regulate carbon dioxide and other greenhouse gases.[105] Petitioners argued that these statements along with other statements made on the EPA's website amounted to an EPA finding that greenhouse gases "may reasonably be anticipated to endanger public health or welfare."[106]

B. The Denial

The EPA solicited public comments regarding the rulemaking petition submitted by Petitioners and received over 50,000 submissions.[107] The EPA also requested assistance from the National Research Council to evaluate Petitioners' request. In its report, the National Research Council stated:

> Greenhouse gases are accumulating in Earth's atmosphere as a result of human activities . . . . Temperatures are, in fact, rising. The changes observed over the last several decades are likely mostly due to human activities, but we cannot rule out that some significant part of these changes is also a reflection of natural variability.[108]

Despite this pronouncement, the EPA seized on language stating "a causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the twentieth century cannot be unequivocally established."[109]

The EPA denied Petitioners' request on several grounds, finding first that it did not have the authority to regulate greenhouse gases

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102. *Id.* Section 103(g) authorizes EPA to conduct research and develop nonregulatory strategies for preventing air pollution including strategies for "preventing or reducing multiple air pollutants, including sulfur oxides, nitrogen oxides, heavy metals, PM-10 (particulate matter), carbon monoxide, and carbon dioxide." 42 U.S.C. § 7403(g) (2006).

103. Cannon Memorandum, *supra* note 100.

104. *Id.* Mr. Cannon noted that sections 108, 109, 111(b), 112, 115, 202(a), 211(c), 231, 612, and 615 share this similar feature.

105. Mank, *supra* note 47, at 66.

106. Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,923 (Sept. 8, 2003).

107. *Id.* at 52,924.

108. NAT'L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME OF THE KEY QUESTIONS 1 (2001).

109. *Id.*

under the CAA.[110] The EPA went on to state that even if it did have authority, it would decline to exercise that authority at this time.[111] The EPA cited potential conflicts with then-President Bush's climate change policy and other foreign policy implications in declining to regulate.[112] Robert Fabricant, the acting EPA General Counsel, withdrew the Cannon memorandum and drafted a new opinion stating that the EPA did not have the authority to regulate carbon dioxide under the CAA, which the EPA relied upon in denying the petition.[113]

C. Court of Appeals

Petitioners filed suit in the U.S. Court of Appeals for the District of Columbia challenging the EPA's denial.[114] The EPA argued that Petitioners had not sufficiently alleged that their injuries were "caused by EPA's decision not to regulate emissions of greenhouse gases from mobile sources" or that their injuries could "be redressed by a decision in their favor."[115] Petitioners presented evidence from a climatologist and a mechanical engineer that carbon dioxide reductions from motor vehicles would reduce the impacts of global warming.[116]

The three-judge panel split three ways on the question of standing. Judge Randolph, writing for the court, recognized that *Steel Co. v. Citizens for a Better Environment* "instructs federal courts to resolve Article III standing questions before proceeding to the merits of a case."[117] However, Judge Randolph believed that because the standing questions were intertwined with the merits, the court had three options: to (1) refer the standing issue to a special master for determination; (2) remand to the EPA for a determination on causation and redressability; or (3) proceed to the merits.[118] Judge Randolph adopted the third approach stating, "We will therefore assume *arguendo* that EPA has statutory authority to regulate greenhouse gases from motor vehicles."[119] Proceeding to the merits, Judge Randolph determined that the EPA properly denied the rulemaking petition.[120]

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110. Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. at 52,925.
111. *Id.*
112. *Id.*
113. *Id.* at 52,929 & n.3. Mr. Fabricant stated a substance must also be an "air pollution agent" to meet the CAA definition of air pollutant. *Id.* at 52,928.
114. Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) [hereinafter *Massachusetts I*].
115. *Id.* at 54.
116. *Id.* at 54–55.
117. *Id.* at 55 (quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998)).
118. *Id.* at 55.
119. *Id.*
120. *Id.*

Judge Sentelle concurred in the judgment—establishing a majority—but dissented on the issue of standing, finding that Petitioners had not established a sufficient injury in fact.[121] Judge Sentelle stated that "after plowing through reams of affidavits and arguments" the petitioners had "alleged and shown no harm particularized to themselves."[122] Judge Sentelle concluded that a generally held grievance common to all members of the public was not sufficient to establish standing.[123]

Judge Tatel dissented on both the standing issue and the merits.[124] Judge Tatel found that Massachusetts had met the injury, traceability, and redressability requirements set forth in *Lujan II*.[125] Judge Tatel stated that the rising sea levels alleged by Massachusetts were sufficient to demonstrate a particularized injury.[126] Furthermore, he reasoned that the allegations—that greenhouse gas emissions from motor vehicles contributed to global warming and that reductions in these emissions would reduce or delay global warming—satisfied the standards for traceability and redressability.[127] Citing the plain language of the statute, Judge Tatel determined that the statutory language of the CAA gave the EPA authority to regulate greenhouse gas emissions from motor vehicles. Judge Tatel held that the EPA had not stated a lawful explanation under the statute for its decision not to regulate.[128]

D. The Supreme Court

The U.S. Supreme Court granted certiorari stating, "[T]he unusual importance of the underlying issue persuaded us to grant the writ."[129] In a 5-4 decision the Court found that at least one petitioner, Massachusetts, had standing to invoke jurisdiction and held that the EPA has the statutory authority to regulate greenhouse gas emissions under section 202(a)(1) of the CAA because such gases fall within the CAA's definition of "air pollutant."[130] Finally, the Court found the only way for the EPA to avoid this statutory obligation was to "ground its reasons for action or inaction."[131] Reversing the decision of the

121. *Id.* at 59.
122. *Id.* at 59–60.
123. *Id.*
124. *Id.* at 61 (Tatel, J., dissenting).
125. *Id.* at 64.
126. *Id.* at 64–65.
127. *Id.* at 65.
128. *Id.* at 74 (noting that Congress did not grant the EPA broad authority "to withhold regulation because it thinks such regulation bad policy").
129. *Massachusetts II*, 127 S. Ct. 1438, 1447 (2007).
130. *Id.* at 1452–63.
131. *Id.* at 1463.

Court of Appeals, the Supreme Court remanded the case.[132] This ruling requires the EPA to reconsider the petition and decide whether the four greenhouse gases cited by Petitioners endanger public health or welfare; if the EPA still elects not to regulate, it must ground its reasons for inaction in the language of the CAA.[133] Justice Stevens delivered the majority opinion, joined by Justices Kennedy, Souter, Ginsburg, and Breyer.[134] Chief Justice Roberts dissented, along with Justices Scalia, Thomas, and Alito.[135]

The opening paragraph of Justice Stevens' majority opinion states, "A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related."[136] Despite the grandeur of this opening statement, the Court did not address the merits of the case until it had established that at least one petitioner, Massachusetts, had standing to invoke the jurisdiction of the Court under Article III of the Constitution.

The Court stated it was of "considerable relevance" that the party seeking review was a sovereign State rather than a private individual.[137] Justice Stevens noted:

> When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted . . . . These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) . . . . Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to *special solicitude* in our standing analysis.[138]

The Court found that the EPA's refusal to regulate carbon dioxide and other greenhouse gases created a redressable harm for Massachusetts.[139]

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132. *Id.*

133. *Id.* at 1463.

134. *Id.* at 1444.

135. *Id.* at 1438.

136. *Id.* at 1446.

137. *Id.* at 1454. The majority cited a 1907 case, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), in support of its proposition that states are not normal litigants. In *Tennessee Copper*, Georgia sought an injunction, alleging an injury to its own land and the lands of its citizens due to noxious gas discharged by neighboring copper companies. *Tenn. Copper*, 206 U.S. 230. The Court held a suit by a state is not the same as a suit between private parties. *Id.*

138. *Massachusetts II*, 127 S. Ct. at 1454–55 (internal citations omitted) (emphasis added).

139. *Id.* at 1455.

Specifically, the Court found that Massachusetts had demonstrated the requisite injury-in-fact, traceability, and redressability to meet the Article III standing requirements.[140] Massachusetts alleged that the accumulation of greenhouse gases in the atmosphere was contributing to an increase in global warming.[141] The State also alleged that experts had reached a "strong consensus" that global warming was causing a rise in sea levels which threatened Massachusetts' coastal land, causing Massachusetts injury in its capacity as landowner.[142]

As for traceability, the Court established that the "EPA d[id] not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming."[143] Petitioners alleged that the U.S. transportation sector emitted more than 6% of worldwide carbon dioxide emissions.[144] The Court concluded that motor-vehicle emissions "ma[d]e a meaningful contribution to greenhouse gas concentrations."[145] Agreeing with Judge Tatel's observation that the EPA would not bother with its current voluntary reduction programs if it believed that emission reductions would have no effect on global warming, the Court reasoned that a favorable decision would reduce—at least to some extent—the harm to Massachusetts.[146] Since Massachusetts had met the injury-in-fact, traceability, and redressability requirements, the Court held that petitioners had standing to challenge the denial of the rulemaking petition.[147]

The Court next addressed the merits. First, the Court distinguished an administrative agency's decision not to initiate an enforcement action from an administrative agency's denial of a petition for rulemaking.[148] In the case of the latter, the Court determined it could reverse action it found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[149] The Court had "little trouble concluding" that section 202(a)(1) authorized the EPA to regulate greenhouse gas emissions from new motor vehicles once the EPA had formed a judgment that these emissions contribute to climate change.[150]

The majority noted that "air pollutant" was defined very broadly in section 7602(g) to include "*any* air pollution agent" and that "welfare"

140. *Id.* at 1455–58.
141. *Id.* at 1455–56.
142. *Id.* at 1454–56.
143. *Id.* at 1457.
144. *Id.*
145. *Id.* at 1457–58.
146. *Id.* at 1458.
147. *Id.*
148. *Id.* at 1459.
149. *Id.* (citing 42 U.S.C. § 7607(d)(9) (2006)).
150. *Id.* at 1459.

was also defined broadly and includes "effects on . . . climate."[151] The Court, declaring that the statute was unambiguous, stated that the "statutory text foreclose[d] EPA's reading" that carbon dioxide was not an air pollutant.[152] The Court disregarded the EPA's argument that Congressional actions over the last few decades merely calling for climate change research foreclosed any reading of the CAA that would require regulation.[153] The Court reasoned that regulatory action does not conflict with collaboration and research, but complements it.[154]

Finally, the Court determined that the EPA's reasoning for not regulating greenhouse gas emissions was not grounded in the CAA.[155] The Court recognized the EPA's authority to form a "judgment" but stated, "the use of the word 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion with defined statutory limits."[156] The Court found that the EPA's "laundry list of reasons not to regulate" were not grounded in the statute. "The statutory question [was] whether sufficient information exists to make an endangerment finding [on whether greenhouse gases may reasonably be anticipated to endanger public health or welfare]."[157]

The dissent disagreed with the majority on both the standing issue and on the merits. Chief Justice Roberts stated that the grievances in the case were not matters for the courts, but matters for the legislative and executive branches to resolve.[158] The Chief Justice accused the majority of "chang[ing] the rules" by recognizing relaxed Article III standards because the allegations were presented by a State.[159] The dissent asserted that the majority lacked support for its position and criticized the majority's reliance on the *Georgia v. Tennessee Copper Co.* case.[160]

Chief Justice Roberts argued that *Tennessee Copper* "stood for nothing more than a State's right, in an original jurisdiction action, to sue in a representative capacity as *parens patriae*."[161] The dissent found that the injury alleged by petitioners did not meet the particu-

151. *Id.* at 1447 (emphasis added).
152. *Id.* at 1460.
153. *Id.* at 1460–61.
154. *Id.*
155. *Id.* at 1460–63.
156. *Id.* at 1462.
157. *Id.* at 1463.
158. *Id.* at 1464.
159. *Id.*
160. *Id.* at 1465–66 (discussing Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907)). The majority cited the case as support for a State's right to protect its sovereign interest. Chief Justice Roberts argued the case has nothing to do with Article III standing and highlights that none of the parties or amici had cited *Tennessee Copper* in their briefs. *Id.*
161. *Massachusetts II*, 127 S. Ct. at 1464–66. The dissent claimed that the Court only recognized that Georgia, as a quasi-sovereign, was entitled to equitable relief

larization and imminent requirements, and that the "reliance on Massachusetts's loss of coastal land as their injury in fact . . . create[d] insurmountable problems for them with respect to causation and redressability."[162] The dissent concluded, "It is ironic that the Court today adopts a new theory of Article III standing for States without the benefit of briefing or argument on the point."[163]

As for the disagreement on the merits of the case, the dissent accused the majority of "invent[ing] a multiple-choice question that the EPA Administrator must answer when a petition for rulemaking is filed."[164] The dissent argued that the majority had no basis for dismissing the EPA's justifications for its determination not to regulate greenhouse gases under the CAA stating that, "the statute says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment."[165]

The dissent stated the statute's use of "its judgment" entitled the EPA to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[166] and that the EPA satisfied the majority's reasoning requirement by referring to the National Research Council's Climate Change Report stating that climate change "cannot be unequivocally established."[167] The dissent also argued that the majority did not determine that greenhouse gases met the first half of the definition of air pollutant—that they were an "air pollution agent or combination of such agents."[168]

IV. ANALYSIS

Massachusetts v. EPA has been hailed as a landmark decision in environmental law. It marks judicial support for federal action on climate change. It recognizes carbon dioxide as an air pollutant under the CAA, which could lead not only to the regulation of mobile sources under section 202 but also stationary sources under section 111 of the Act. The decision has potentially profound implications for the doc-

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rather than settling for the legal remedy that private litigant would have had to settle for. *Id.*

162. *Id.* at 1467–68.

163. *Id.* at 1466.

164. *Id.* at 1472. The dissent argued that under the CAA the Administrator is not required to make a judgment whenever a petition for rulemaking is filed. *Id.*

165. *Id.* at 1474.

166. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *Chevron* stands for the proposition that an administrative agency's interpretation is entitled to deference where it reasonably accommodates competing interests.

167. *Massachusetts II*, 127 S. Ct. at 1473–74.

168. *Id.* at 1475. The dissent argued that the EPA's conclusion that a substance is not an air pollutant merely because it is a "physical, chemical. . . . substance or matter which is emitted into or otherwise enters the ambient air" is reasonable under the CAA. *Id.* at 1460.

trine of standing and administrative law. The decision also marks an increased role in state participation in environmental law cases.

A. Standing: The Court Got It Right, But How Did They Get There?

Much uncertainty and speculation surrounded how the Court would resolve the standing issues raised in the case. In recent years, standing in environmental cases has become somewhat like a pendulum, with leniency in the application of the doctrine changing from case to case.[169] With the relatively recent appointments of Chief Justice Roberts and Justice Alito, some anticipated a reversion to the strict standards set forth in *Lujan II*. Onlookers were at least hoping for a procedural clarification of the standing doctrine. Those anticipating clarification on the doctrine of standing did not receive it. Instead, the Court made the issue more confusing.

The Supreme Court in its majority opinion held that at least one Petitioner—Massachusetts—had standing. However, rather than just say that Massachusetts had met the requisite injury in fact, traceability, and redressability standards, the Court took a unique, if not odd, approach in its reasoning.

The Court outlined three rationales that could lead to Massachusetts's standing. First, the majority noted that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests'—here, the right to challenge agency action unlawfully withheld—'can assert that right without meeting all the normal standards for redressability and immediacy.'"[170] Second, the majority noted it was highly significant that Massachusetts was a state and not a private litigant. The Court cited three "sovereign prerogatives" surrendered by states to the U.S. Government and alluded that this gave states "special solicitude" in the Court's analysis.[171] Third, the majority went through the standing requirements set forth in *Lujan II* and determined that Massachusetts had demonstrated a sufficient injury-in-fact, traceability, and redressability.[172] The Supreme Court was correct in concluding that Massachusetts had standing to invoke the jurisdiction of the Court; however, its recognition of a "special solicitude" for states seems unnecessary and avoidable. So why did they do this?

Answering this question is like answering a multiple-choice question on an extremely difficult exam. Were they (a) attempting to show that Massachusetts had an extraordinarily strong case and could meet

169. *See supra* text accompanying notes 80–94.
170. *Massachusetts II*, 127 S. Ct. at 1453 (internal citations omitted).
171. *Id.* at 1454–55.
172. *Id.* at 1455–58.

the standing requirements under multiple rationales; (b) attempting to provide new, more lenient standing requirements for states; (c) attempting to allow Massachusetts to meet standing requirements in this case without lowering the threshold for private litigants in future cases; (d) all of the above; or (e) none of the above?

The Court could have found that injury-in-fact, traceability, and redressability existed and left its reasoning at that. After all, the majority did find that Massachusetts had "a particularized injury in its capacity as landowner" and that its unchallenged affidavits had stated that Massachusetts's coastal land was already a victim of rising seas.[173] As Mr. Milkey, Massachusetts's assistant attorney general and counsel of record, stated in his oral argument, "The injury doesn't get any more particular than states losing 200 miles of coastline."[174]

The majority also found that the EPA's failure to regulate greenhouse gases contributed to Massachusetts's injury as a landowner and that incremental steps such as regulating motor vehicle emissions could reduce its injury as a landowner.[175] After all, transportation accounts for a large and increasing output of carbon dioxide.[176] Therefore, it seems that the majority had established a sufficient basis for standing by merely relying on the *Lujan II* test alone.

However, the injury-in-fact relied upon by the majority had been criticized as being too remote.[177] Chief Justice Roberts accused the majority of weakening the doctrine of standing.[178] Justice Stevens and the majority were criticized for being too lenient in their analysis of Massachusetts's standing argument.[179] If the majority had merely relied on its application of the traditional standards, Chief Justice Roberts would be right. The standing doctrine pendulum would move back over to the lenient standing requirement side and onlookers would have to wait patiently for the next standing case to see if the change would survive. Because the majority did not solely rely on the traditional standing requirements, it seems they recognized the possibility that other courts might believe they had lowered the threshold necessary to establish standing.

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173. *Id.* at 1456.

174. *See* Transcript of Oral Argument at 10, *Massachusetts II*, 127 S. Ct. 1438 (No. 05-1120).

175. *Massachusetts II*, 127 S. Ct. at 1447–58.

176. Greene & Schafer, *supra* note 36, at iii (noting that "[g]iven its size and rate of growth, any serious GHG [greenhouse gas] mitigation strategy must include the transportation sector").

177. Jonathan Adler, Massachusetts v. EPA *Heats Up Climate Policy No Less Than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 Nw. U. L. REV. COLLOQUY 32 (2007).

178. *Massachusetts II*, 127 S. Ct. at 1463–71 (Roberts, C.J., dissenting).

179. Adler, *supra* note 177, at 33 (criticizing the majority for applying the standing elements in a "most undemanding fashion.").

Possibly, the Court did not want to encourage a flood of lawsuits filed on behalf of large (and small) landowners against a number of potential defendants (the EPA, energy companies, etc.). At oral argument, Justice Kennedy seemed to foreshadow this concern by asking, "Suppose there were a big landowner that owned lots of coastline. Would he have the same standing that you do or do you have some special standing as a State . . . ?"[180] He went on to ask this same question about a small landowner.[181] It seems that the Court wanted to distinguish Massachusetts from a private litigant. The Court was throwing sandbags at the floodgates, so to speak, to preserve standing as a tool for lower courts to use in resolving cases alleging injuries as a result of global warming.

The question then becomes, were they trying to show that Massachusetts had a really strong case because it was a state, or were they trying to show that they were only lowering the bar for Massachusetts because it was a state?

Justice Stevens argued that, "States are not normal litigants for purposes of invoking federal jurisdiction."[182] In establishing that States deserve "special solicitude" in the Court's standing analysis, the majority invoked the language of *Georgia v. Tennessee Copper Co.*:

> This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.[183]

In addition to citing the State's "well-founded desire to preserve its sovereign territory," the Court referred to surrendered "sovereign prerogatives" implying Massachusetts would have standing to sue *parens patriae* "if the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."[184] Chief Justice Roberts argued that *parens patriae* actions raise an additional hurdle for a state litigant"—the need to show a quasi-sovereign interest—which "makes the required showing here harder, not easier."[185] But even if the standing requirements are more difficult for state litigants, Massachusetts met this requirement by demonstrating a dual injury to itself and its citizens.

Justice Stevens and Chief Justice Roberts both cited *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez* supporting their respec-

180. *See* Transcript of Oral Argument at 14, *Massachusetts II*, 127 S. Ct. 1438 (No. 05-1120).
181. *Id.* at 15.
182. *Massachusetts II*, 127 S. Ct. at 1454.
183. *Id.* at 1454 (quoting Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).
184. *Id.* (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982)).
185. *Id.* at 1466 (Roberts, C.J., dissenting).

tive positions.[186] In *Snapp,* the Court identified the types of interests a state might have as follows. A state's sovereign power allows it to "create and enforce a legal code" and "demand recognition from other sovereigns." A state's proprietary power allows it to "own land or participate in a business venture." Finally, a state's quasi-sovereign power allows the state to look after the "interests that the State has in the well-being of its populace."[187]

As Chief Justice Roberts pointed out, Massachusetts' injury in its capacity as landowner would not fall under the State's quasi-sovereign interest, but rather its proprietary interest.[188] However, at oral argument, Mr. Milkey referred to the 200 miles of coastline as "both sovereign territory and property we actually own,"[189] suggesting that the injury-in-fact relied upon by the majority—Massachusetts's loss of coastline—would cover both the State's proprietary interest and its quasi-sovereign interest in looking after its populace.

Mr. Milkey further alleged that, "the States are showing harm not only to them in a property sense, but in their sovereign capacity."[190] Mr. Milkey referred the Court to the amicus brief of the State of Arizona et al.,[191] which claimed that States have special standing based upon the sovereignty of States and their inability to regulate when administrative decisions preempt state law.[192] So even if *parens patriae* standing does raise an additional hurdle, under the majority's reasoning, Justice Stevens seems to lump the State's "sovereign prerogatives" into Massachusetts's "stake in protecting its quasi-sovereign" interests.[193] Therefore, it seems the majority was able to both, as Chief Justice Roberts said, "relax[] Article III standing require-

186. *Snapp*, 458 U.S. at 592. Puerto Rico was attempting to sue private apple growers, *parens patriae*, on behalf of a small group of its citizens who claimed that they were discriminated against in violation of federal law.

187. *Id.* at 601–02; *see* Kathryn Watts & Amy Wildermuth, Massachusetts v. EPA: *Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. COLLOQUY 1 (2007).

188. *Massachusetts II*, 127 S. Ct. at 1467.

189. *See* Transcript of Oral Argument at 10, *Massachusetts II*, 127 S. Ct. 1438 (No. 05-1120).

190. *Id.* at 14.

191. Arizona, Iowa, Maryland, Minnesota, and Wisconsin submitted a brief as amici curiae.

192. *See* Transcript of Oral Argument at 17, *Massachusetts II*, 127 S. Ct. 1438 (No. 05-1120); Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners at 1, *Massachusetts II*, 127 S. Ct. 1438 (No. 05-1120) ("Such decisions injure the States by preventing them from creating or enforcing their sovereign law, and States should be able to seek redress for those injuries by challenging federal administrative decisions in federal court.").

193. *Massachusetts II*, 127 S. Ct. at 1454–55; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (The majority entrenched the position set forth in Lujan that the Court will not "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.").

ments because asserted injuries are pressed by a State" and show that Massachusetts had a really strong case because it could show an injury in all three interests set forth in *Snapp*.[194] Regardless of the majority's reasons for recognizing a "special solicitude" for state litigants, Massachusetts demonstrated the standing requirements set forth in *Lujan II*; therefore, the Court was correct in finding that Massachusetts had standing to invoke the Court's jurisdiction.

The majority's opinion will surely have an impact on the doctrine of standing. For private litigants, the traditional standing requirements set forth in *Lujan II* will still apply. The Court has not raised or lowered the threshold for private litigants as the Court went out of its way to emphasize the unique position of states in its analysis. As for states acting as litigants, their position has—at least slightly—improved. Had the Court merely stated that because of its interests as a quasi-sovereign, Massachusetts had "special solicitude" in the standing analysis and then proceeded directly to the merits, the decision would have far-reaching consequences for the doctrine of standing.[195] However, the Court did not take that position, but still required the State to satisfy a *Lujan* analysis. So it seems the Court is willing to apply the *Lujan II* requirements somewhat less vigorously so long as the State can also assert an interest in its capacity as a quasi-sovereign, but is not willing to eliminate the requirements altogether.

B. The Merits: Good Outcome, Shaky Ground

While certainly many were interested in the Court's ruling on the standing issue, most environmentalists waited with bated breath for the Court's decision involving carbon dioxide and its status as a potential air pollutant. The Supreme Court held that the EPA does have authority to regulate the emission of greenhouse gases from new motor vehicles because greenhouse gases fit within the CAA definition of air pollutant.[196]

While the plain language of section 302(g) does support the Court's finding,[197] it is difficult to set aside the implications of Congressional actions[198]—or perhaps more appropriately—nonaction for the past

194. *Massachusetts II*, 127 S. Ct. at 1464.

195. *Id.* at 1471. Even Chief Justice Roberts recognized the implications should not be far-reaching, stating in his dissent, "The good news is that the Court's 'special solicitude' for Massachusetts limits the future applicability of the diluted standing requirements applied in this case." *Id.*

196. *Id.* at 1462.

197. *See supra* section III.A, explaining that Section 302(g) defines an air pollutant as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . . substance or matter which is emitted into or otherwise enters ambient air."

198. *See supra* section II.B, discussing Congress' stance that research and voluntary actions are sufficient to address climate change.

thirty years in order to conclude that greenhouse gases could be regulated under section 202(a)(1).

There were two potential interpretations the Court could have adopted. The EPA advanced an interpretation that a substance must be an agent of air pollution in order to be an air pollutant. "Because EPA lacks CAA regulatory authority to address global climate change, the term 'air pollution' as used in the regulatory provisions cannot be interpreted to encompass global climate change."[199] The majority passed over the EPA's interpretation, instead opting for the reading offered by Petitioners who argued that the greenhouse gases associated with climate change are plainly "air pollutants" under the plain text of the CAA. "Motor vehicles *emit* the *physical* and *chemical matter* carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons *into the ambient air*."[200]

The majority is correct in noting that the language Congress used in section 302(g) defining "air pollutant" is broad.[201] The repeated use of the word "any" is telling and unambiguously encompasses a wide range of potential air pollutants. While Congress did make section 302(g) broad, and technically carbon dioxide does fit within the definition, it seems unlikely that Congress intended this result. Congress has a history of avoiding the regulation of greenhouse gases. Congress has enacted a number of legislative proposals relating to greenhouse gases—all calling for additional research and eschewing mandatory regulations.[202] In 1990, a Senate committee included a provision to regulate carbon dioxide emissions for motor vehicles, but the provision was removed before the bill was sent to a full Senate vote.[203]

In response to this history, the majority acknowledged that while "the Congresses that drafted section 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the CAA

199. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003); *see also* Brief for the Federal Respondent at 33, *Massachusetts II*, 127 S. Ct. 1438 ("[G]reenhouse gases are not 'agents' of air pollution for regulatory purposes because they do not cause cognizable 'pollution' within the scope of the Act's regulatory provisions.").

200. Brief for Petitioners at 24, *Massachusetts II*, 127 S. Ct. 1438 (No. 05-1120).

201. Section 302(g) reads "The term 'air pollutant' means *any* pollution agent or combination of such agents, including *any* physical, chemical, biological, radioactive, (including source, material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used." 42 U.S.C. § 7602(g) (2006) (emphasis added).

202. *See supra* text accompanying notes 47–54.

203. *See supra* text accompanying notes 42–46.

obsolete."[204] While the holding may not be on completely solid ground, the Supreme Court did not err in finding that the EPA has authority under section 202(a)(1) because greenhouse gases fit within the definition of air pollutant set forth in section 302(g).[205]

After finding that the EPA did have the authority, the Court answered the question of whether the EPA's stated reasons for failing to regulate greenhouse gas emissions from new motor vehicles were consistent with the statute. The Court did not err when it held that the EPA's reasoning was divorced from the statutory text. Section 202(a)(1) does condition the EPA's action on its formation of a "judgment." However, it also states that judgment must relate to whether the emission of any air pollutants "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." This standard is precautionary and allows the EPA to take action before actual harm occurs. Because this standard is precautionary and because the EPA has acknowledged the existence of global warming and has initiated some voluntary emission reduction programs in the past, at some point the EPA will have to make an endangerment finding related to greenhouse gases. This will require regulation either under the CAA or more likely under some future Congressional legislation.

C. The Implications

1. The Administration

The Supreme Court did not order the EPA to regulate greenhouse gases. The Court remanded the case for the EPA to reconsider its denial of the petition requesting regulation of the greenhouse gases associated with climate change under section 202(a)(1).[206] If the EPA decides not to regulate, it must provide an adequate justification based on the statutory text. Realistically, however, the Court has forced the EPA's hand.

Given the EPA's pronouncements on climate change and global warming in the past, it will be difficult for the EPA to deny that climate change cannot "reasonably be anticipated to endanger public health or welfare" and still retain credibility. In the EPA's original order denying the rulemaking request, the EPA did not discount the existence of global climate change and the potential effects. In fact, the EPA stated, " We agree with the President [then-President George

204. *Massachusetts II*, 127 S. Ct. at 1462.

205. *See supra* text accompanying note 201.

206. *Massachusetts II*, 127 S. Ct. at 1463.

W. Bush] that 'we must address the issue of global climate change.'"[207]

While the EPA now has the authority to regulate greenhouse gases under section 202 and it seems inevitable that the EPA will indeed have to regulate greenhouse gases under this provision (barring intervention from Congress), it is not likely to occur anytime soon. Since the decision in *Massachusetts v. EPA* does not require the EPA to regulate carbon dioxide under the CAA until it makes an endangerment finding, the EPA still has room to stall. However, the decision does place pressure on the legislative and executive branches to take more immediate action on the issue of climate change.

The day after the Supreme Court's ruling in *Massachusetts v. EPA*, then-President Bush remarked,

> First of all, the decision of the Supreme Court we take very seriously. It's the new law of the land . . . . My attitude is, is that we have laid out a plan that will affect greenhouse gases that come from automobiles by having a mandatory fuel standard that insists upon using 35 billion gallons of alternative fuels by 2017, which will reduce our gasoline usage by 20 percent and halt the growth in greenhouse gases that emanate from automobiles. In other words, there is a remedy available for Congress.[208]

Then-President Bush gave no indication that he would order the EPA to regulate emissions under section 202(a)(1), indicating that the Bush Administration felt that current measures were sufficient, and basically passed the buck to Congress.[209] However, the decision in *Massachusetts v. EPA* seems to suggest otherwise, so that at the very least, future administrations will have to make the determination that greenhouse gases represent a danger to public health or welfare.

Then-President Bush went on to add, "I have said that [climate change] is a serious problem. I recognize that man is contributing greenhouse gases . . . ."[210] However, then-President Bush made it clear that he would not approve anything that could potentially restrain economic growth.[211] On May 16, 2007, then-President Bush made a formal response to the *Massachusetts v. EPA* opinion, and is-

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207. Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003).

208. President George W. Bush, Remarks on the Emergency Supplemental (Apr. 3, 2007), http://www.whitehouse.gov/news/releases/2007/04/20070403.html.

209. Felicity Barringer & William Yardley, *Bush Splits With Congress and States on Emissions*, N.Y. TIMES, Apr. 4, 2007, at A1; *see also* Juliet Eilperin & R. Jeffrey Smith, *EPA Won't Act on Emissions This Year*, WASH. POST, July 11, 2008, at A1 (reporting fifteen months after the Supreme Court's decision was announced that the "Bush Administration has decided not to take any new steps to regulate greenhouse gas emissions . . . despite pressure . . . that new regulation is appropriate now." Instead the EPA is seeking additional comments.).

210. President George W. Bush, Remarks on the Emergency Supplemental (Apr. 3, 2007), http://www.whitehouse.gov/news/releases/2007/04/20070403.html.

211. *Id.* (President Bush confirmed that "anything that happens cannot hurt economic growth.").

sued an executive order addressing the decision. The order required the EPA and the Departments of Transportation, Energy, and Agriculture "to protect the environment with respect to greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines, in a manner consistent with sound science, analysis of benefits and costs, public safety, and economic growth" utilizing President Bush's "Twenty in Ten" plan.[212]

It was significant that then-President Bush involved four separate administrative entities in the order because it made the odds of accomplishing anything meaningful in the final days of the Bush Administration very low and it did not specifically direct the EPA to act concerning "public health and welfare" as section 202(a)(1) requires, but instead gave consideration to economic issues.[213] After the decision was released, then-President Bush invited representatives from the world's leading economies to take part in a summit lead by the Secretary of State to establish *voluntary* goals for reducing greenhouse gas emissions.[214] It seems that while the Bush Administration acknowledged the *Massachusetts* decision, it gave only an illusion of deference to it.

Even if the decision did not compel the Bush Administration to act quickly and promulgate regulations for greenhouse gases under section 202(a)(1), it did not foreclose the possibility that the present Obama Administration will take action.[215] Since President Obama was committed to addressing global warming on the campaign trail, it is possible that administrative action under the CAA may not be too far down the road.

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212. Exec. Order No. 13,432, 72 Fed. Reg. 27,717 (2007) (President Bush's "Twenty in Ten" plan calls for cutbacks in gas consumption by twenty percent in the next ten years); *see also* President George W. Bush, President Bush Discusses CAFE and Alternative Fuel Standards (May 14, 2007), http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html ("Last month, the Supreme Court ruled that the EPA must take action under the Clean Air Act regarding greenhouse gas emissions from motor vehicles. So today, I'm directing the EPA and the Department of Transportation, Energy, and Agriculture to take the first steps toward regulations that would cut gasoline consumption and greenhouse gas emissions from motor vehicles, using my 20-in-10 plan as a starting point.").

213. *See* Exec. Order No. 13,432, 72 Fed. Reg. 27,717 (Section 1 clearly states, "To protect the environment . . . in a manner consistent with . . . economic growth.").

214. Michael Fletcher, *Bush Sets Emissions Summit: World Powers Are Invited to Discuss Climate Change, Growth*, WASH. POST, Aug. 4, 2007.

215. Interview by Ray Suarez with Carol Browner, Former EPA Administrator (Apr. 2, 2007), http://www.pbs.org/newshour/bb/law/jan-june07/scotus_04-02.html. Former EPA Administrator Carol Browner stated, "The court very clearly said that EPA can regulate greenhouse gases under the existing Clean Air Act, that they do not need to go to Congress and get new authority. I doubt this administration, the Bush Administration, is going to take advantage of that, but certainly I think future administrations will." *Id.*

2. Congress

The CAA was enacted in the 1970s in response to localized pollutants that led to smog and other air conditions.[216] As such, it may not be the best tool to regulate greenhouse gases—despite the fact that the Court ruled that carbon dioxide could be regulated under section 202(a)(1). This places increased pressure on Congress to enact better legislation.[217] Connecticut Senator Joseph Lieberman, a sponsor of many greenhouse gas reduction bills, stated that the Supreme Court's decision had the effect of "knocking down yet another empty excuse for inaction."[218]

Proposals calling for the regulation of greenhouse gas emissions have been floating around Congress for several years now. Senators McCain and Lieberman first introduced their Climate Stewardship Act in 2003, but the Senate rejected the measure.[219] The bill was reintroduced in 2005 where it faced the same fate.[220] In the first few months of 2007, no less than five proposals to control greenhouse gas emissions were introduced in the Senate.[221] Measures range from limiting carbon dioxide emissions from automobiles on a gram per mile basis to establishing greenhouse gas tradable allowance systems.[222] The number of proposals introduced is increasing as discussion is expected to begin this fall.[223]

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216. *See supra* section II.B.

217. Robert Barnes & Juliet Eilperin, *High Court Faults EPA Inaction on Emissions Critics of Bush Stance on Warming Claim Victory*, WASH. POST, Apr. 3, 2007, at A1. John Dingell, Chairman of the House Energy and Commerce Committee and Representative for Michigan, stated, "While I still believe Congress did not intend for the Clean Air Act to regulate greenhouse gases, the Supreme Court has made its decision and the matter is now settled. Today's ruling provides another compelling reason why Congress must enact, and the president must sign, comprehensive climate change legislation." *Id.*

218. Joel Lang & Michael Regan, *Court's Climate Ruling Hailed May Help States Fight Greenhouse Emissions*, HARTFORD COURANT, Apr. 3, 2007.

219. Press Release, Joe Lieberman U.S. Senate, Lieberman, McCain Reintroduce Climate Stewardship and Innovation Act (Jan. 12, 2007), http://lieberman.senate.gov/newsroom/release.cfm?id=267559. The bill called for a cap and trade system with the goal of reducing carbon dioxide emissions to 2000 levels by the year 2010. *Id.*

220. *Id.*

221. *Senate Greenhouse Gas Cap-And-Trade Proposals in the 110th Congress*, PEW CENTER ON GLOBAL CLIMATE CHANGE, Feb. 2007, *available at* http://www.pewclimate.org/docUploads/Cap%2Dand%2Dtrade%20bills%20110th%5FFeb5%2Epdf (last visited Mar. 15, 2009).

222. Global Warming Pollution Reduction Act, S. 309, 110th Cong. § 707 (2007); Climate Stewardship and Innovation Act of 2007, S. 280, 110th Cong. (2007).

223. *See* Steven Mufson, *2 Senators to Unveil Climate Bill: Plan Would Auction Emission Allowances, Cut Greenhouse Gases*, WASH. POST, Aug. 2, 2007, at D3. A number of additional proposals have been introduced in both the House and the Senate since the Supreme Court's Decision. *See* Global Climate and Ozone Layer Protection Act of 2007, H.R. 3448, 110th Cong. (2007); Clean Air/Climate Change

The CAA is a tool that can be used to regulate greenhouse gases, however, it is not the best tool because it was originally drafted with local air pollutants in mind. If Congress does not enact new legislation that can more effectively manage greenhouse gas emissions, then it will have to accept potential EPA regulations to manage global climate change in its place. Because of the divisive nature of climate change regulations and the ramifications these regulations could have on industry, the issue would be better addressed by Congress rather than delegated to an administrative agency.

3. The States

In addition to pressuring the federal government into taking action, the Supreme Court's decision is likely to trigger an increase in state and local action. State and local governments have already played a positive role in encouraging greenhouse gas reductions, but this decision should buoy them to continue doing so. For example, California passed a law requiring greenhouse gas emissions to be reduced to 1990 levels by 2020.[224] Hawaii and New Jersey have passed similar legislation, and more states are sure to follow.[225]

The states have been innovators on the climate change front. At least forty states have introduced some type of climate change legislation.[226] Ten northeastern states have formed the Northeast Regional Greenhouse Gas Initiative, the first mandatory carbon trading system in the United States, which will cover fossil-fuel burning power plants operating over a specified capacity.[227] Following that collaboration, six western states and two Canadian provinces have formed the Western Regional Climate Initiative and are developing a market-based system to achieve a regional greenhouse reduction goal.[228]

Act of 2007, S. 1168, 110th Cong. (2007); Safe Climate Act of 2007, H.R. 1590, 110th Cong. (2007); Global Warming Reduction Act of 2007, S. 485, 110th Cong. (2007).

224. California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38550 (West 2007).

225. *See* Global Warming Response Act, N.J. STAT. ANN. § 26:2C-37 (West 2007) (setting a mandatory limit on greenhouse gas emissions not to exceed 1990 levels by 2020); Global Warming Solutions Act of 2007, 2007 Haw. Sess. Laws Act 234 (requiring the state to reduce greenhouse gas emissions to levels at or below 1990 levels by 2020).

226. Barringer & Yardley, *supra* note 209 (reporting that according the National Conference of State Legislatures "[a]t least 300 bills have been filed in 40 states that address heat-trapping gases and climate change in some form").

227. Eric B. Rothenberg & John Rousakis, *Exploring the Carbon Trading Landscape*, N.Y. L.J., July 16, 2007, at 8 (The participating states include Connecticut, Delaware, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.).

228. *Id.* The participating states include Arizona, California, New Mexico, Oregon, Utah, and Washington as well as two Canadian provinces British Columbia and

California has also led the way among the states (and the Federal Government) in enacting tougher standards that limit the amount of carbon dioxide gases that can be emitted from motor vehicles. Ten other states have adopted California's tougher rules with more in the process of adopting them.[229] However, before these tougher standards can take effect, California must receive a waiver from the EPA. Once California receives the waiver, other states can follow in implementing them.[230]

California submitted a waiver request in 2005, but the EPA was concerned over its authority to issue the waiver and wanted to hold off on the issue until after the Supreme Court had addressed its authority in *Massachusetts v. EPA*.[231] The automobile industry challenged the tougher rules in *Central Valley Chrysler v. Witherspoon*, but the case was placed on hold until after the Supreme Court's decision was announced.[232] The decision should be very beneficial to California's position since the Supreme Court announced both that the greenhouse gases California seeks to control can be classified as air pollutants and that the EPA has the authority to regulate them.[233] However, the EPA stated, "As far as the impact of the Supreme Court decision on EPA's [own] authority, EPA is reviewing the court decision and will move forward in a deliberate manner."[234]

Other states currently involved in climate change litigation can find support from the Supreme Court's ruling as well.[235] States now have the opportunity to play an increasingly important role. States can continue to fill the void of federal inaction on this important issue. The Supreme Court has recognized the state's unique position and need to protect its quasi-sovereign rights. Now that states have "spe-

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Manitoba. A full listing of states joining as observers is available at http://www.westernclimateinitiative.org.

229. John Gray, *Where Do We Go From Here? Reconsidering Global Warming After* Massachusetts v. EPA, ANDREWS ENVTL. LITIG. REP., May 2, 2007, at 13.

230. 42 U.S.C. § 7543 (2006). Clean Air Act § 209 allows California to promulgate tougher standards but it must obtain a waiver from the EPA. Once a waiver is obtained than other states are also free to adopt California's standards. *Id.*

231. Sholnn Freeman, *State's Adopt California's Greenhouse Gas Limits*, WASH. POST, Jan. 3, 2006, at D1; Dean Scott, *EPA Readying Proposal on California Waiver After High Court's Climate Change Decision*, ENV'T. REP. (BNA), Apr. 6, 2007, at 799.

232. Cent. Valley Chrysler-Jeep, Inc. et al. v. Witherspoon, 2007 WL 135688 (E.D. Cal. Jan. 16, 2007).

233. Jerry Brown, California's Attorney General stated the ruling "makes it very clear that California has a right to regulate greenhouse gases." Bob Egelko, *Ruling Helps California Battle Global Warming Supreme Court Affirms that States Can Limit Greenhouse Gases, Attorney General Says*, S.F. CHRON., Apr. 3, 2007, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/C/a/2007/04/03/MNGHCP0JK31.DTL (last visited Jan. 9, 2009); *see* Gray, supra note 229.

234. Scott, *supra* note 231.

235. Lang & Regan, *supra* note 218.

cial solicitude" in the standing analysis, State Attorney Generals can play a more active role. Where private environmental groups are likely to be unsuccessful, a State Attorney General may have success in supporting concerned citizens.[236]

4. *Industry and Economy*

Petitioners were testing the waters with this case. The majority of greenhouse gas emissions in this country come from industry and electricity generation.[237] Section 111 of the CAA requires the EPA Administrator to set emissions standards for certain "categories of stationary sources."[238] The Administrator "shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[239]

Industry does not want to take the risk and uncertainty of an unfavorable judicial ruling. Already, industry groups have begun to lobby Congress, requesting mandatory emissions caps.[240] Executives of the Big Three[241] auto companies testified in the House that they supported carbon dioxide regulation.[242] They would rather face the possibility of reasonable regulations now than face the unknown. If the federal government continues to delay taking action, industries facing regulation could see a drastic rise in their operating costs.

By asking for mandatory regulations, industry groups can stabilize their operations. In addition, these corporations can take advantage of the goodwill created by their "altruistic" action and take advantage of the building environmental movement with consumers.[243] Many companies have already begun to develop voluntary programs in anticipation of mandatory regulations to come.[244]

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236. Dru Stevenson, *Special Solicitude for State Standing:* Massachusetts v. EPA, 112 PENN ST. L. REV 1 (2007).

237. Greene & Schafer, *supra* note 36, at iii.

238. 42 U.S.C. § 7411 (2006).

239. *Id.*

240. Barringer & Yardley, *supra* note 209.

241. The Big Three U.S. automobile companies are General Motors, Ford, and Chrysler.

242. Barringer & Yardley, *supra* note 209.

243. For example, G.E. has adopted Ecoimagination and British Petroleum has adopted Beyond Petroleum

244. *See generally* Gary C. Bryner, *The National Energy Policy: Assessing Energy Policy Choices*, 73 U. COLO. L. REV. 341, 391 (2002) (stating that British Petroleum, DuPont, Lockheed Martin, Ontario Power, Shell, and United Technologies are all developing voluntary emissions reduction and trading programs).

Perhaps the largest impact the decision will have is fast-tracking legislation for the imposition of a carbon credit trading system.[245] Europe and Britain already have mandatory limits in place regulating carbon markets.[246] Australia is in the process of implementing its own limits.[247] Several states have formed regional markets, and the Chicago Climate Exchange already operates a market for companies participating in voluntary limits. Trading on the European market amounted to $24.4 billion in 2006, and the Chicago Climate Exchange traded $38 million in voluntary activity in 2006.[248] Industry recognizes carbon trading as a potential tool to help the bottom line of businesses in the face of mandatory regulation.

V. CONCLUSION

The issue of global climate change is highly debated, and a political compromise will not be forced by the decision of the Supreme Court. Politicians will continue to have doubts about the severity of the situation and the potential consequences of inaction despite the Supreme Court's endorsement that it is a concrete and imminent threat to the well-being of Massachusetts and others in kind. However, the opinion may coerce some action and make it easier for states to pick up the slack of federal inaction on the issue.

As discussed above, the Supreme Court determined that carbon dioxide is an air pollutant under section 302(g) of the CAA and can be regulated by section 202(a)(1); however, it did not order the EPA to do so. Nevertheless, the decision still lends judicial support for the need to take action on global climate change. Not only did the decision lend support to environmental advocates, but it also recognized States as dominant players in the field—a role that many seem willing and able to take on.

With the start of a new administration, increasing support from industry, and a Supreme Court that seems lenient toward global warming litigation, the pressure is increasing on elected officials to take action sooner rather than later. While *Massachusetts v. EPA* did not give standing to the trees, it did give the Lorax—or at least the states in its place—a fighting chance.[249]

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245. Greene & Schafer, *supra* note 36, at v (Generally, there are three types of emission trading programs: reduction credit trading, emissions rate averaging, and cap-and-trade programs.).

246. Rothenberg & Rousakis, *supra* note 227, at 1–3.

247. *Id.* at 3.

248. *Id.*

249. Justice Douglas' dissent in *Sierra Club* argued that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." Sierra Club v. Morton, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting). While

SO. . .
Catch!" calls the Once-ler.
He lets something fall.
"It's a Truffala Seed.
It's the last one of all!
You're in charge of the last of the Truffala Seeds.
And Truffala Trees are what everyone needs.
Plant a new Truffala. Treat it with care.
Give it clean water. And feed it fresh air.
Grow a forest. Protect it from axes that hack.
Then the Lorax
and all of his friends
may come back.[250]

Massachusetts v. EPA did not confer standing upon the earth or the trees, at least they gave their representatives some added ground to stand on.

250. DR. SEUSS, *supra* note 1, at 61.